

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARIO TRUJILLO,

No. C 10-5183 YGR (PR)

Plaintiff,

VS.

FRANCISCO JACQUEZ, et al.,

Defendants.

**ORDER DENYING MOTION TO DISMISS;
GRANTING RENEWED MOTION FOR
APPOINTMENT OF COUNSEL;
REFERRED ACTION TO FEDERAL PRO
BONO PROJECT; DIRECTING PARTIES TO
CONSENT TO OR DECLINE MAGISTRATE
JUDGE JURISDICTION; AND ADDRESSING
OTHER PENDING MOTIONS**

/ (Docket nos. 96, 99, 105, 115)

On November 16, 2010, Plaintiff, a California prisoner proceeding *pro se* and currently incarcerated at Pelican Bay State Prison (hereinafter "PBSP"), filed the above-titled civil rights action under 42 U.S.C. § 1983, alleging that he was subjected to excessive force at PBSP for injuries incurred on February 16, 2009. In an Order dated February 10, 2011, after reviewing the complaint, the Court found Plaintiff had stated cognizable Eighth Amendment claims against Defendants PBSP Correctional Officers Michael E. Polk and J. Reynoso for the use of excessive force, against Defendants PBSP Correctional Officers Nicholas White, J. Kay, C. Mova, F. Avila, A. Long and D. Hickman for failing to intervene, and against Defendant PBSP Acting Warden Francisco Jacquez for supervisory liability. In the same Order, the Court directed Defendants to file a dispositive motion or, in the alternative, a notice indicating Defendants are of the opinion such a motion is not warranted.

On June 17, 2010, Defendants Polk, Reynoso, White, Kay, Mova, Long, Hickman, and Jacquez (hereinafter "Defendants") filed a motion for summary judgment on the grounds that no material issue of fact existed as to their liability under the Eighth Amendment and that they were entitled to qualified immunity for their actions.¹ Defendants also argued that Plaintiff's supervisory liability claim against Defendant Jacquez was not cognizable under 42 U.S.C. § 1983 because the

¹ In an Order dated June 8, 2011, the Court dismissed all claims against Defendant Avila without prejudice pursuant to Rule 4(m) of the Federal Rules of Civil Procedure.

1 complaint alleged no facts showing Defendant Jacquez's personal involvement in the use of force
2 incident.

3 In an Order dated March 15, 2012, the Court granted in part and denied in part Defendants'
4 motion for summary judgment. The Court granted the motion as to Defendant Jacquez and
5 dismissed the supervisory liability claims against him with leave to amend. The Court directed
6 Plaintiff to file an amendment to the complaint that stated his supervisory claim with specificity,
7 linking Defendant Jacquez's conduct to his claim of excessive force. The motion for summary
8 judgment as to the claims against Defendant Long was denied without prejudice to file another
9 motion after further discovery. The Court denied the motion as to all other Defendants and directed
10 these Defendants not to bring an additional motion for summary judgment without its express
11 permission. The parties were also ordered to appear before Magistrate Judge Nandor Vadas for
12 court-ordered settlement proceedings.

13 On May 31, 2012, Plaintiff filed his amendment to the complaint.

14 On July 30, 2012, the parties appeared before Magistrate Judge Vadas for a settlement
15 conference.

16 On August 1, 2012, Magistrate Judge Vadas filed a Report of Pro Se Prisoner Early
17 Settlement Proceeding, which indicated that the matter did not settle. The report also stated:
18 "However, the parties agreed to stipulate to Magistrate Judge Vadas' jurisdiction in this matter."
19 (Aug. 1, 2012 Report at 2.) Thereafter, Plaintiff filed a letter to Magistrate Judge Vadas in response
20 to the report stating, "it was not [his] intention to agree . . . to stipulate to turn the jurisdiction of this
21 case into your or the jurisdiction of a magistrate judge." (Pl.'s Letter dated Aug. 9, 2012 at 1.)

22 On September 4, 2012, Plaintiff filed a renewed motion for appointment of counsel.
23 Defendants filed an opposition to this renewed motion, and Plaintiff filed a reply.

24 On September 11, 2012, Defendants filed a "Motion for a Screening Order, or in the
25 Alternative, to Strike Amended Complaint." Plaintiff filed an opposition to their motion, and
26 Defendants filed a reply.

27 On February 27, 2013, Plaintiff filed a motion to compel discovery. Defendants filed an
28 opposition to the motion to compel, and Plaintiff filed a reply.

1 On May 15, 2013, Defendants filed a motion to dismiss, arguing that this action cannot
2 proceed because the complaint and amendment to the complaint fail to state a claim upon which
3 relief can be granted under Federal Rule of Civil Procedure 12(b)(6).²

4 For the reasons outlined below, the Court DENIES Defendants' motion to dismiss as to all
5 claims. In addition, the Court GRANTS Plaintiff's renewed motion for appointment of counsel and
6 refers this matter to the Federal Pro Bono Project. The Court DENIES Plaintiff's motion to compel
7 without prejudice to refiling once he is represented by pro bono counsel. Finally, the Court directs
8 the parties to either consent to or decline the jurisdiction of Magistrate Judge Vadas for all further
9 proceedings in this action, including trial.

DISCUSSION

I. Motion to Dismiss Eighth Amendment Claims

12 Defendants argue that Plaintiff cannot proceed with his Eighth Amendment claims against
13 Defendants because, as a result of the same incident, Plaintiff was found guilty at a disciplinary
14 hearing of battery on a peace officer and was assessed a 150-day forfeiture of good-time credits.
15 Consequently, Defendants claim that Plaintiff's excessive force claim is barred under *Heck v.*
16 *Humphrey*, 512 U.S. 477 (1994). Specifically, Defendants argue that Plaintiff's Eighth Amendment
17 claim may not proceed because he has not successfully invalidated the good-time credit forfeiture
18 that he received as a result of the alleged excessive force incident.

19 *Heck* held that, in order to recover damages for an allegedly unconstitutional conviction or
20 imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or
21 sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed or
22 otherwise set aside or called into question. *Id.* at 486-87. *Heck* also applies to prisoner civil rights
23 actions challenging a disciplinary hearing or administrative sanction that affects the overall length of
24 the prisoner's confinement. *See Sheldon v. Hundley*, 83 F.3d 231, 233 (8th Cir. 1996) (holding *Heck*
25 bars challenge to disciplinary proceeding that resulted in improper deprivation of good-time credits);
26 *cf. Ramirez v. Galaza*, 334 F.3d 850, 857-58 (9th Cir. 2003) (holding that challenge to disciplinary

² Under Rule 12(b), a motion under Rule 12(b)(6) "must be made before pleading if a responsive pleading is allowed." Fed. R. Civ. Proc. 12(b). Because Defendants did not file an answer in the instant action, the Court may consider their Rule 12(b)(6) motion even after it has already denied their previously-filed motion for summary judgment.

1 proceeding that resulted in ten-day disciplinary detention, loss of privileges and a twenty-
 2 four-month administrative segregation term was not barred by *Heck*). Specifically, *Heck*'s rationale
 3 bars a claim for damages for harm caused by the unconstitutional deprivation of good-time credits
 4 because such a claim necessarily calls into question the lawfulness of the plaintiff's continued
 5 confinement, insofar as it implicates the duration of the plaintiff's sentence. *See Sheldon*, 83 F.3d at
 6 233.

7 In the present case, Defendants argue that Plaintiff's excessive force claim is barred under
 8 *Heck* because, if the excessive force claim were proven, it would necessarily imply the invalidity of
 9 the finding of guilt after a disciplinary proceeding on the charge of battery on a peace officer.³

10 The Ninth Circuit has made clear that *Heck* does not bar all such excessive force actions,
 11 however. In *Smith v. City of Hemet*, 394 F.3d 689, 699 (9th Cir. 2005) (en banc), the Ninth Circuit
 12 explained that "a § 1983 action is not barred under *Heck* unless it is clear from the record that its
 13 successful prosecution would *necessarily* imply or demonstrate that the plaintiff's earlier conviction
 14 was invalid." The plaintiff in *Smith* had been convicted of resisting a police officer under California
 15 Penal Code section 148, and claimed that the officer had used excessive force against him. *Id.* at
 16 694. In order to determine whether the excessive force claim was barred under *Heck*, the Ninth
 17 Circuit looked to the elements of a conviction for resisting a police officer under section 148, and
 18 found that an essential element of such a conviction is that the police officer was "engaged in the
 19 performance of his official duties." *Id.* at 695. Under California law, if such element is admitted or
 20

21 ³ In support of their argument, Defendants have cited to a copy of the results of the
 22 disciplinary proceeding, which was attached to Plaintiff's complaint. (Mot. to Dismiss at 6
 23 (citing Compl., Ex. B).) In so doing, Defendants are asking the Court to take judicial notice
 24 of these results as evidence of the fact that the length of Plaintiff's sentence was altered
 25 thereby. As a general rule, a district court may not consider material outside the pleadings in
 26 ruling on a Rule 12(b)(6) motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.
 27 2001). A court may, however, consider material that is properly submitted as part of the
 28 complaint, without converting the motion to dismiss into a motion for summary judgment.
Id. If the documents are not physically attached to the complaint, they may be considered if
 the documents' authenticity is not contested and the Plaintiff's complaint "necessarily relies"
 on them. *Id.* In the instant matter, in support of Plaintiff's Eighth Amendment claim that
 Defendants Polk and Reynoso used excessive force against him, Plaintiff's complaint
 references and necessarily relies upon the results of the disciplinary proceeding. (Compl. at
 12-13.) Accordingly, the Court will grant Defendants' request for judicial notice of the fact
 that Plaintiff was found guilty of battery on a peace officer, and was assessed a forfeiture of
 150 days of good-time credits as a result thereof.

1 proved, the police officer necessarily was engaged in "lawful" conduct, which, in turn, necessarily
2 excludes the use of excessive force. *Id.* at 695-96. The Ninth Circuit thus concluded that where a
3 plaintiff has been convicted under section 148 for resisting a police officer during the course of an
4 arrest, his subsequent § 1983 claim that the police officer used excessive force at the time the arrest
5 was effected would, if successful, necessarily undermine the conviction, and would be barred under
6 *Heck*. *Id.* at 697-98. By contrast, if the plaintiff claims the police officer used excessive force either
7 before or after the conduct on which the plaintiff's conviction was based, *Heck* would not bar his
8 claims that the force was excessive, because the alleged acts of excessive force would not
9 necessarily invalidate the conviction. *Id.* at 698. Looking to the record before it in *Smith*, the Ninth
10 Circuit could not identify the factual basis for the plaintiff's guilty plea to resisting a police officer;
11 consequently, it could not determine whether the acts underlying the conviction occurred during the
12 course of the plaintiff's arrest; accordingly, the Ninth Circuit reversed the district's court's grant of
13 summary judgment, which ruling had been predicated on *Heck*. *Id.* at 699.

14 Here, Defendants have not shown that if Plaintiff were to prevail on his excessive force
15 claims the validity of the finding that he committed battery on a peace officer necessarily would be
16 implicated. The essential reason Defendants' argument fails is because they have not set forth the
17 elements of the charge of which Plaintiff was found guilty, battery on a peace officer under Title 15
18 of the California Code of Regulations § 3005(d)(1). Consequently, because Defendants have not
19 shown that a finding of their use of excessive force would necessarily negate an element of the
20 aforementioned battery charge, the Court cannot conclude that Plaintiff's claims are barred under
21 *Heck*. As *Smith* made clear, a § 1983 claim alleging the use of excessive force will be barred under
22 *Heck* only where "it is clear from the record that its successful prosecution would *necessarily*" imply
23 the invalidity of Plaintiff's underlying finding of guilt. *Smith*, 394 F.3d at 699. Accordingly, the
24 Court DENIES Defendants' motion to dismiss Plaintiff's excessive force claims as barred under
25 *Heck*.

26 **II. Motion to Dismiss Supervisory Liability Claim Against Defendant Jacquez**

27 Defendants also argue that Plaintiff fails to state a cognizable claim for relief against
28 Defendant Jacquez because "a party cannot be held liable under 42 U.S.C. § 1983 merely because

1 he served as an alleged tortfeasor's supervisor." (Mot. to Dismiss at 2.)

2 A supervisor may be liable under section 1983 upon a showing of (1) personal involvement
3 in the constitutional deprivation or (2) a sufficient causal connection between the supervisor's
4 wrongful conduct and the constitutional violation. *Redman v. County of San Diego*, 942 F.2d 1435,
5 1446 (9th Cir. 1991) (en banc), *cert. denied*, 502 U.S. 1074 (1992) (citation omitted). A supervisor
6 therefore generally "is only liable for constitutional violations of his subordinates if the supervisor
7 participated in or directed the violations, or knew of the violations and failed to act to prevent them."
8 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). An administrator may be liable for deliberate
9 indifference to a serious medical need, for instance, if he or she fails to respond to a prisoner's
10 request for help. *Jett v. Penner*, 439 F.3d 1091, 1098 (9th Cir. 2006). "'Supervisory liability is
11 imposed against a supervisory official in his individual capacity for his own culpable action or
12 inaction in the training, supervision, or control of his subordinates, for his acquiescence in the
13 constitutional deprivations of which the complaint is made, or for conduct that showed a reckless or
14 callous indifference to the rights of others.'" *Preschooler II v. Davis*, 479 F.3d 1175, 1183 (9th Cir.
15 2007) (citations omitted). Evidence of a prisoner's letter to an administrator alerting him to a
16 constitutional violation is sufficient to generate a genuine issue of material fact as to whether the
17 administrator was aware of the violation, even if he denies knowledge and there is no evidence the
18 letter was received. *Jett*, 439 F.3d at 1098. Evidence that a prison supervisor was personally
19 involved in an unconstitutional transfer and denied all appeals of the transfer, for example, may
20 suffice. *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992); *see also Watkins v. City of*
21 *Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998) (supervisor who signed internal affairs report
22 dismissing complaint against officer despite evidence of officer's use of excessive force may be
23 liable for damages).

24 In its March 15, 2012 Order, the Court found that Plaintiff "ha[d] not alleged specific facts
25 linking Defendant Jacquez's individual conduct to the cause of harm Plaintiff complains he suffered
26 as alleged in his complaint." (March 15, 2012 Order at 16.) Thus, as mentioned above, the Court
27 dismissed the supervisory liability claim against Defendant Jacquez with leave to amend, stating:
28 "Plaintiff may file an amendment to the complaint that states his claim with specificity, linking

1 Defendant Jacquez's conduct to his claim of excessive force" (*Id.*)

2 In his amendment to the complaint, Plaintiff claims that Defendant Jacquez was one of the
3 prison officials who reviewed Plaintiff's appeals and did not remedy the constitutional violation.
4 (Am. to Compl. at 3.) Attached to Plaintiff's amendment to the complaint is Defendant Jacquez's
5 Memorandum relating to the Second Level Appeal Response, which was processed as a "Staff
6 Complaint Appeal Inquiry." (*Id.*, Ex. A.) The record shows that Defendant Jacquez conducted a
7 inquiry into Plaintiff's allegations stemming from the alleged incident of excessive force involving
8 Defendants Polk and Reynoso. (*Id.*) As a result of the inquiry, Defendant Jacquez chose not to refer
9 the matter to the Office of Internal Affairs. (*Id.*) Instead, Defendant Jacquez stated that a
10 "confidential" investigation was conducted, and it was found that "[s]taff did not violate CDCR
11 policy." (*Id.*) Read liberally, the allegations in Plaintiff's amendment to the complaint state a
12 cognizable claim against Defendant Jacquez because Plaintiff has stated his claim with specificity,
13 i.e., he has linked Defendant Jacquez's conduct to his claim of excessive force through the
14 aforementioned actions of reviewing the appeal and failing to remedy the constitutional violation.
15 Accordingly, this supervisory liability claim may proceed against Defendant Jacquez, and
16 Defendants' motion to dismiss this claim is DENIED.

17 Because the Court has reviewed Plaintiff's amendment to the complaint and found a
18 cognizable supervisory liability claim, Defendants' "Motion for a Screening Order, or in the
19 Alternative, to Strike Amended Complaint" (Docket No. 99) is DENIED as moot.

20 **III. Motion to Compel Discovery and Renewed Motion for Appointment of Counsel**

21 This case has been pending for almost three years, and the events at issue occurred more than
22 four years ago. Consequently, the case will proceed to trial. Prior to setting this matter for trial, and
23 good cause appearing,

24 IT IS HEREBY ORDERED that Plaintiff's Renewed Motion for Appointment of Counsel is
25 GRANTED and this case is referred to the Federal Pro Bono Project of the Volunteer Legal Services
26 Program, which will attempt to find an attorney who is able to represent him in these proceedings, as
27 directed below.

28 Because the Court is appointing counsel for Plaintiff, his motion to compel discovery is

1 DENIED without prejudice to refiling after pro bono counsel has been appointed to represent him.

2 **IV. Reassignment to Proceed Before United States Magistrate Judge Upon Consent**

3 As mentioned above, Magistrate Judge Vadas initially submitted a report indicating that the
4 parties agreed to "stipulate to Magistrate Judge Vadas' jurisdiction in this matter." (Aug. 1, 2012
5 Report at 2.) However, Plaintiff has since denied that he agreed to such a stipulation. (Pl.'s Letter
6 dated Aug. 9, 2012 at 1.) Because the Court has now denied Defendants' pending motion to dismiss
7 and will be appointing counsel for Plaintiff, it directs the parties to consider whether to consent to
8 proceed before Magistrate Judge Vadas for all further proceedings in the case, including trial.

9 Plaintiff is specifically directed to consider whether to consent to magistrate judge jurisdiction only
10 after pro bono counsel has been appointed to represent him. For this reason, the Court directs the
11 parties to complete the "Consent or Declination to Magistrate Judge Jurisdiction" form attached to
12 this Order no later than **twenty-eight (28) days** after pro bono counsel has been appointed for
13 Plaintiff.

14 **CONCLUSION**

15 For the reasons discussed above, the Court orders as follows:

16 1. Defendants' motion to dismiss (Docket No. 115) is DENIED as to all claims.

17 Specifically, the Court finds that (1) the Eighth Amendment claims against Defendants are not
18 barred by *Heck*; and (2) Plaintiff's amendment to the complaint states a cognizable supervisory
19 liability claim against Defendant Jacquez.

20 2. Defendants' "Motion for a Screening Order, or in the Alternative, to Strike Amended
21 Complaint" (Docket No. 99) is DENIED as moot.

22 3. Plaintiff's Renewed Motion for Appointment of Counsel (Docket No. 96) is
23 GRANTED. This case is referred to the Federal Pro Bono Project of the Volunteer Legal Services
24 Program, which will attempt to find an attorney who is able to represent him in these proceedings.

25 a. The Clerk of the Court shall forward electronically to the Federal Pro Bono
26 Project: (a) a copy of this Order; (b) a copy of the docket sheet; (c) a copy of the operative complaint
27 and amendment to the complaint (Docket Nos. 1, 84); (d) copies of the Court's Order of Service
28 (Docket No. 3) and its Order granting in part and denying in part Defendants' motion for summary

1 judgment (Docket No. 75); and (e) a memorandum summarizing the claims and status of the case.

2 b. If an attorney can be found to represent Plaintiff, that attorney shall be
3 appointed as counsel for Plaintiff in this matter until further order of the Court.

4 c. All proceedings in this action are STAYED until **four (4) weeks** from the date
5 an attorney is appointed to represent Plaintiff in this action, or until the Court otherwise lifts the
6 stay.

7 4. Plaintiff's motion to compel discovery (Docket No. 105) is DENIED without
8 prejudice to refiling after pro bono counsel has been appointed to represent him.

9 5. No later than **twenty-eight (28) days** after pro bono counsel has been appointed to
10 represent Plaintiff, the parties are directed to consider whether to consent to proceed before
11 Magistrate Judge Vadas for all further proceedings in the case, including trial, by completing the
12 "Consent or Declination to Magistrate Judge Jurisdiction" form attached to this Order.

13 6. The Clerk shall send Defendants' counsel as well as Plaintiff and his pro bono
14 counsel (after one is appointed by the Court) a copy of the "Consent or Declination to Magistrate
15 Judge Jurisdiction" form attached to this Order.

16 7. This Order terminates Docket Nos. 96, 99, 105 and 115.

17 IT IS SO ORDERED.

18 DATED: September 17, 2013


19 YVONNE GONZALEZ ROGERS
20 UNITED STATES DISTRICT COURT JUDGE

21
22
23
24
25
26
27
28

1 IN THE UNITED STATES DISTRICT COURT
2
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4
5 MARIO TRUJILLO, No. C 10-5183 YGR (PR)
6 Plaintiff,
7 vs.
8 FRANCISCO JACQUEZ, et al.,
9 Defendants.
10 _____ /
11
12 INSTRUCTIONS: Please indicate below by checking one of the two boxes whether you choose to
13 consent to or decline magistrate judge jurisdiction in this matter. Sign this form below your
14 selection.
15
16 () **Consent to Jurisdiction of Magistrate Judge Nandor Vadas**
17
18 In accordance with the provisions of 28 U.S.C. § 636(c), I voluntarily **consent** to have
19 Magistrate Judge Vadas conduct all further proceedings in this case, including trial and entry of
20 final judgment.
21
22 **OR**
23
24 () **Decline Magistrate Judge Jurisdiction**
25
26 In accordance with the provisions of 28 U.S.C. § 636(c), I **decline** to have a United States
27 magistrate judge conduct all further proceedings in this case, including trial and entry of final
28 judgment.

DATE: _____, 20____ NAME: _____

AT: _____ *(Write place where signed)* _____ *(Signature)*